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# THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1898, No. 153.

JOHN K. MULLEN AND  
CHARLES D. MCPHEE,

*Plaintiffs in Error,*

vs.

THE WESTERN UNION BEEF  
COMPANY,

*Defendant in Error.*

*Error to the Court  
of Appeals of the  
State of Colorado.*

STATEMENT AND BRIEF OF PLAINTIFFS IN  
ERROR.

W. C. KINGSLEY,  
*Attorney for Plaintiffs in Error.*



IN  
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STATEMENT OF CASE.

The action was brought by the plaintiffs in error to recover damages for loss of cattle on their range in Colorado in the summer of 1891, occasioned by the introduction among their cattle of a large herd of 3,000 head of Texas cattle in June of that year, in violation of the Act of Congress of May 29, 1884, and the rules and regulations made

thereunder in February and April, 1891, by the Secretary of Agriculture. The defendant denied such violation and damage.

These rules and regulations were introduced in evidence by said plaintiffs upon the trial of the case and their violation shown, resulting in large loss to the plaintiffs; but they were deprived by the trial court and also by the Court of Appeals, of the benefit of said act and the rules made thereunder; the trial court only giving to the rules the effect of notice or opinion, while the Court of Appeals held them inoperative, because unauthorized by said Act of Congress.

There are nine errors assigned in this Court, all of which we shall present and discuss under the second and third propositions now to be stated, as follows:

We contend:

*First*—That the judgment we ask to have reversed was rendered by the highest court in the state of Colorado, in which a decision in the suit could have been had.

*Second*—That in the Court pronouncing such judgment, the decision of a federal question was necessary to the determination of the case, and such question was actually decided adverse to the plaintiffs in error; and

*Third*—That such decision was erroneous.

#### FIRST.

The Court of Appeals of Colorado was the highest court in the state in which a decision in this suit could have been had.

This Court of Appeals was created by an Act

of the Legislature of said state, approved April 6, 1891.

Session Laws of Colorado for 1891, p. 118.

Section 1 of said act provides as follows:

"No writ of error from, or appeal to, the Supreme Court shall lie to review the final judgment of any inferior court unless the judgment, or in replevin the value found, exceeds \$2,500, exclusive of costs. Provided, this limitation shall not apply where the matter in controversy relates to a franchise or freehold, nor where the construction of a provision of the Constitution of the state or of the United States is necessary to the determination of a case. Provided, further, that the foregoing limitation shall not apply to writs of error to county courts."

Section 4 of said act provides:

"That the said court shall have jurisdiction:

"*First*—To review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital.

"*Second*—It shall have final jurisdiction, subject to the limitations stated in subdivision 3 of this section, where the judgment, or in replevin the value found is \$2,500 or less, exclusive of costs.

"*Third*—It shall have jurisdiction, not final, in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the Constitution of the state or of the United States is necessary to the decision of the case, also in criminal cases or upon writs of error to the judgments of county courts. Writs of error from, or appeals to, the Court of Appeals shall lie to review final judgments, within the same time and in the same manner as is now or may hereafter be provided by law for such reviews by the Supreme Court."

Unless the adjudication of this case involved a franchise or freehold, or the construction of a pro-

vision of the Constitution of the state of Colorado or of the United States, the judgment of the Court of Appeals is final, and therefore confers upon *this* Court jurisdiction.

It is certain that no franchise or freehold or construction of any provision of the constitution of the State of Colorado was involved, so that the only remaining question is whether the construction of any provision of the constitution of the United States was "necessary to the decision of the case" as required by said section 4, which could, if true, deprive this judgment of its final character.

Walter A. Wood Mowing and Reaping  
Machine Co, vs. Skinner, 139 U. S., 293.

As above stated, this case was brought to recover damages sustained by the plaintiffs below on account of the introduction by the defendant below, of a herd of Texas cattle in June, 1891, into the plaintiffs' herd of domestic cattle in Colorado. The cause of action alleged in the complaint was the violation by said defendant of certain rules and regulations made by the United States Department of Agriculture in February and April, 1891, in accordance with and by virtue of an Act of Congress, approved May 29, 1884, entitled "An Act for the Establishment of a Bureau of Animal Industry, etc." 23 U. S. Statutes at Large, p. 31. The defendant denied the violation of said rules and regulations, and attempted, without success, to show their subsequent modification through oral interviews, and the trial court was asked by the plaintiffs to instruct the jury as follows, as to the force and effect of such rules and regulations :

"If the jury are satisfied from the evidence that the defendant company failed to comply with paragraph 2 of the rules and regulations of the United States Department of Agriculture of April 23, 1891 ; and that the defendant company did not put its cattle in pens or on trails or ranges that were to be occupied or crossed by the plaintiffs' cattle going to eastern markets before December, 1891, so that these two classes should not come in contact, then that constitutes negligence and want of reasonable care on the part of the defendant, and you need not look to any other evidence to find that the defendant did not use reasonable care in this case, and that the defendant was guilty of negligence."

Refused by the Court and exception by the plaintiffs.

And also, "that Secretary Rusk could not do away with or modify paragraph 2 of the rules and regulations of the department of April 23, 1891, in any such manner as the defendant, by its evidence, claims that it was so modified or changed ; and that said paragraph 2 was in full force and effect at the time of the shipment of defendant's cattle in 1891."

Refused by the Court and exception by plaintiffs. Page 251, printed record.

These instructions were refused, but the trial court among other things, upon its own motion, instructed the jury as follows :

"In the year 1884 the Congress of the United States enacted a law making it the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, which would cover a disease like this now under consideration, and to certify such rules and regulations to the executive authority of each state and territory, and invite said authorities to co-operate in the execution and enforcement of such act.

"It seems that prior to April, 1891, the Secretary of Agriculture gave notice, which is equivalent to promulgating a rule or rules under this statute to which I have called your attention, that cattle might thereafter be moved from a certain area (including Kimble county, among others) into the states of Colorado, Wyoming and Montana for grazing purposes, with this provision, among others, that such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1891, and that these two classes of cattle—that is, cattle coming from that section from which these came, and cattle intended for the eastern markets—should not be allowed to come into contact with each other. It is claimed on the part of the plaintiffs that the defendant violated this provision of this notice. It is claimed on the part of the defendant that prior to the shipment of the cattle the Secretary of Agriculture had modified this rule. I think the evidence, and I so charge you, fails to show that the Secretary of Agriculture had in a legal manner rescinded or abrogated the rule, so that this rule, remained and was in force at the time that these cattle were landed at Iliff, in this state. The rule, then, would have the effect to give this defendant notice that the United States authority having in charge the animal industries, so far as the government of the United States may control it, were of the opinion that it was unsafe to ship cattle from Kimble county at that period of the year into Colorado and graze them upon lands that were being occupied by other cattle intended for the eastern market, or to allow them to commingle with them." (Pp. 257-8, printed record.)

The trial court, it will be seen, construed these rules and regulations made by a cabinet officer under the authority of an Act of Congress, as effective only as *notice* or matter of *opinion*; while the Court of Appeals, in deciding the case, in construing this Act of Congress, which author-

size said rules, held that these rules and regulations were not in force because they were not made in conformity with, nor authorized by said act. Neither the trial court nor the Court of Appeals construed, or had occasion to construe any provision of the constitution of the United States, so that it is true that the judgment of the Court of Appeals in this case was a final judgment of the highest court of the state of Colorado in which a decision of the case could have been made; for unless, as above shown, it was necessary to the decision of the case that the Court of Appeals should construe some provision of the constitution of the United States, no appeal from, or writ of error to, that court would lie to have its judgment reviewed by the Supreme Court of the state of Colorado, and inasmuch as the case was heard and decided by the trial court and the Court of Appeals without any reference by either court to or any construction of any provision of the constitution of the United States, how can it be said that such construction was "necessary to a decision of the case?"

Dean vs. Nelson, 7 Wall., 342.

McGourkey vs. R. R. Co., 146 U. S., 536.

Dainess vs. Kendall, 119 U. S., 53.

#### SECOND.

The Court which rendered this judgment, decided a Federal question adversely to the plaintiffs in error, and such decision was necessary to the determination of the case.

To make this clear let us look again at the case in the trial court.

The complaint alleges, among other things (page 23 of printed record), that plaintiffs were engaged in the cattle business in the state of Colorado; that the range for their cattle was mainly, if not entirely; in the county of Logan, in said state; that said range lies along and near the Platte river, upon the lands of the plaintiffs and the public lands adjacent thereto, and that in and during the year 1891 the plaintiffs had upon said range about 3,000 head of cattle.

That about the fifteenth of June, 1891, the defendant negligently, wrongfully and unlawfully shipped from Kimble county, Texas, and other parts of said state, a large number of Texas cattle, principally steers, which were about the nineteenth day of said month negligently, wrongfully and unlawfully loaded and turned loose at a point about three miles west of plaintiffs' said lands and cattle; that among the said plaintiffs' cattle there were about 500 beef cattle—steers—ready to be shipped to Omaha and Chicago—Eastern market—and that said beef cattle were then about to go, and would have gone, to said Eastern markets long before the first of December of that year, and that the defendant wrongfully, negligently and unlawfully, allowed and permitted its said Texas cattle at the said season of the year to occupy the range which the plaintiffs' cattle occupied, and that the said defendant allowed and permitted its said cattle to come in contact with the said cattle of the plaintiff contrary to and in violation of the quarantine rules and regulations and orders of the United States Department of Agriculture, established under and by virtue of the acts of Congress, and also contrary

to and in violation of the quarantine rules, regulations and orders of the state of Colorado, issued and established for the year 1891.

Then follow allegations as to the spread of the contagion from the cattle of defendants to those of the plaintiffs, and the consequent loss to plaintiffs.

The answer of defendant denies negligence on his part, and denies that it transported cattle from Texas to Colorado contrary to, or in violation of, any regulations of the United States Department of Agriculture, but alleges that all cattle transported by it were transported in strict accordance with such regulations.

Here was a clear tender and joinder of issue upon the question of the negligence of defendant company, through violation of the regulations of the United States Department of Agriculture made and existing by authority of the Act of Congress.

In the submission of the case to the jury the trial court presented the contention of plaintiffs that their loss was occasioned through the violation by defendant of the Act of Congress, and the regulations made thereunder by the Secretary of Agriculture concerning the introduction of cattle, as above shown in this brief.

Plaintiffs claimed their right to recover for loss sustained by them through a violation by defendant of the Federal regulation mentioned, under the well known principle of law, that where loss is occasioned by the violation of a public law or regulation, the violator is by that act guilty of negligence as matter of law, and no proof of negligence in *fact* is required to fix upon him the liability to respond in damages for the loss occasioned by such unlawful

act. In other words, in such case, to entitle plaintiffs, *prima facie*, to recover, they had only to prove the violation by defendant of the rules and regulations and the loss ensuing to them in consequence of such violation.

The instructions given by the Court show that a construction of this Act of Congress and these rules and regulations was given by the trial court, and that such construction deprived plaintiffs in error of a right claimed under said Act of Congress and rules and regulations, and of which construction plaintiffs in error complain. The trial court, as above shown, gave to such rules and regulations the force and effect only of *notice* or the expression of an *opinion* by the Department of Agriculture, while plaintiffs in error then contended and now contend that they had the force and effect of law.

Wilcox vs. Jackson, 13 Peters, 498.

Adams vs. Freeman, 50 Pac. Rep., 135.

If we look now at the decision of the Court of Appeals, we find that this Court rested its decision entirely upon a Federal question.

A reference to the opinion (pages 7 and 8 of printed record) shows that the Court of Appeals affirmed the judgment of the court below solely on the ground that it was the evident intention of Congress that the rules and regulations to be made under the act by the Commissioner of Agriculture or the Secretary of Agriculture were not to have force until accepted by the local executive authorities; that the regulations of February 5th and April 23d of the said secretary were not within, but were beyond, the provisions of the said Act of Congress.

There were some errors claimed as to the admission and exclusion of evidence, and as to the instructions of the court below, but the Court of Appeals, after delivering its opinion as to the three foregoing points disposes of the questions as to evidence and instructions in the following language:

" \* \* \* It would have been of no benefit to the plaintiffs if everything in the way of evidence which they offered had been received and everything that they objected to had been excluded; so that the errors, if any, were harmless."

Nothing more conclusive could be sought for as to the fact that the judgment was solely upon the construction of a Federal question, and that it deprived plaintiffs in error of rights claimed thereunder.

Walter A. Wood Mowing and Reaping  
Machine Co. vs. Skinner, 139 U. S.,  
*supra*.

### THIRD.

The decision of the Federal question by the Court of Appeals was erroneous.

The Federal question referred to in this proposition is the construction given by the Court of Appeals:

- 1st. To the said Act of Congress of May 29, 1884; and
- 2d. To the rules and regulations of February 5th and April 23d, 1891.

The purpose of this act was to establish a Bureau of Animal Industry, and through it to provide means for the suppression and extirpation of diseased cattle, and prevent their exportation abroad or commercial *status* at home.

By Section 2 of the Act, the Commissioner of Agriculture was empowered to appoint agents, whose duty it should be, under his instructions, to examine and report upon the means to be adopted for the suppression and extirpation of pleuro-pneumonia, and to provide against the spread among animals of other dangerous, contagious and infectious diseases. Section 3 made it his duty to prepare such rules and regulations as he might deem proper for the speedy and effectual suppression and extirpation of the diseases referred to, and to certify such rules and regulations to the executive authority of each state and territory, and invite such authority to co-operate in the execution and enforcement of the act, authorizing him, upon the acceptance by any state or territory wherein such disease should be declared to exist, of his plans and methods, or, upon the acceptance by him of plans or methods adopted for the same purpose by any such state or territory wherein such disease should be declared to exist, to expend so much of the money appropriated by the act as might be necessary to prevent the spread of such diseases from one state or territory into another. Section 4 required him to make special investigation as to the existence of any of the diseases along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock were exported, and report the result of his investigation to the Secretary of the Treasury, who should, from time to time, establish such regulations for the export and transportation of live stock as the result of the investigation might require. Section 5 author-

ized the Secretary of the Treasury, for the purpose of preventing exportation from the United States to foreign countries, of live stock affected with contagious diseases, to take such steps and adopt such measures, not inconsistent with the provisions of the act, as he might deem necessary. Sections 6 and 7 are as follows:

"Section 6. That no railroad company within the United States, or the owners or masters of any steam, or sailing, or other vessel, or boat, shall receive for transportation or transport, from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; provided, that the so-called splenic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of Sections 4, 5, 6 and 7 of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

"Section 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company, doing business in or through any infected locality, and by publication in such newspapers as he may select,

of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of, or person having control over, such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section 6 of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

By subsequent legislation the Department of Agriculture was created, to be under the supervision and control of a Secretary of Agriculture, and the authority vested in the Commissioner of Agriculture, and the duties which the law devolved upon him, were transferred to the Secretary of Agriculture. Whatever orders, therefore, the commissioner could have lawfully issued could be issued by the secretary as his successor.

The rules and regulations introduced in evidence by the plaintiffs were dated, respectively, February 5 and April 23, 1891, and are as follows:

"Regulations Concerning Cattle Transportation.—United States Department of Agriculture. Office of the Secretary, Washington, D. C., February 5, 1891. To the Managers and Agents of Railroad and Transportation Companies of the United States, Stockmen and Others: In accordance with Section 7 of the Act of Congress, approved May 29, 1884, entitled 'An act for the establishment of a bureau of animal industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals,' and of the Act of Congress, approved July 14, 1890, making appropriation for the Department of Agriculture for the fiscal year

ending June 30, 1891, you are notified that a contagious and infectious disease known as splenetic or southern fever exists among cattle in the following described area of the United States. (Here follows a certain described area.)

From the fifteenth day of February to the first day of December, 1891, no cattle are to be transported from said area to any portion of the United States north or west of the above-described line, except in accordance with the following regulations." (Here follows a series of stringent rules concerning the method to be pursued in transporting cattle from the infected districts. See printed record, pages 51 and 52.)

"United States Department of Agriculture. Office of the Secretary, Washington, D. C., April 23, 1891.—Notice is hereby given that cattle which have been at least ninety days in the area of country hereinafter described may be moved from said area by rail into the states of Colorado, Wyoming and Montana, for grazing purposes, in accordance with the regulations made by said states for the admission of southern cattle thereto. Provided:

(1) That cattle from said area shall go into said states only for slaughter or grazing, and shall on no account be shipped from said states into any other state or territory of the United States before the first day of December, 1891.

(2) That such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1891, and that these two classes shall not be allowed to come in contact.

(3) That all cars which have carried cattle from said area shall, upon unloading, at once be cleaned and disinfected in the manner provided by the regulations of this department of February 5, 1891.

(4) That the state authorities of the states of Colorado, Wyoming and Montana agree to enforce these provisions."

The territory described in both orders includes that from which the defendant's cattle were shipped, and it is the rules relating to the isolation of cattle moved from infected districts, and more particularly the second proviso of the second order, which are claimed to have been violated by the defendant.

The rules and regulations made by the direction of a statute have the authority of the statute itself, and ~~that~~ their violation is, in effect, a violation of the statute.

The Court of Appeals held that these rules and regulations were inoperative because

*First*—Not made under Section 3 of said act <sup>but under</sup>

*Second*—Not accepted by the executive authority of Colorado.

*Third*—They violated Section 6 of said act.

<sup>re-</sup>  
~~legis-~~ In reply to these objections, we say as to this legislation of February 5 :

*First*—It refers not only to Section 7 of the act of May 29, 1884, but to the Act of July 14, 1890.

*Second*—It purported to give the *notice* required by Section 7, and then proceeds to exercise the *power* authorized by Sections 3 and 7.

*Third*—The recital or mention by the secretary of the wrong section of a statute for the source of his power, would not and did not limit any power conferred on him by congress through this act.

*Fourth*—This rule was no violation of Section 6 of said act.

This Section 6 prohibited—

*First*—Any transportation company *anywhere in the United States* from receiving for transporta-

tion or transporting from one state to another any *diseased cattle*.

*Second*—Any delivery for such transportation *with knowledge* of such disease.

*Third*—Transportation on foot or private conveyance of any *diseased cattle*, knowing them to be diseased.

As to this Section 6, we note that its prohibitory features are aimed at *diseased cattle*, and not at any *locality*. Its provisions did not apply to "cattle being transported by *rail to market for slaughter*, when the same are unloaded only to be fed and watered in lots on the way thereto."

Congress did not designate the infected localities or districts, this is necessarily left for the administrative department of the government, and this power to so designate is by necessary implication found in both Sections 3 and 7.

The rules *expressly* authorized in Section 3 are "for the speedy and effectual suppression and extirpation" of this disease among cattle. The power of designating certain states or territories or geographical localities as an "infected locality" or an "infected district," within the meaning of Section 7, is not *expressly* conferred either by Sections 3 or 7, but that it is given by necessary implication in both sections must be conceded, so that our Court of Appeals erred in depriving these rules of February 5th of force, because not authorized by Section 7, under which they were claimed to have been made.

Again, this rule did not in fact nor did it in effect, permit anything prohibited by said Section 6, for, as we have already said, said section had no

reference to *locality*, but to *cattle* anywhere in the United States. It will be noted that the secretary by this February 5th rule did not authorize the removal of *diseased* cattle, contrary to said Section 6, but did, under certain conditions, permit the moving only of cattle which it was thought *safe to move*.

The secretary had the power to designate the "infected districts," but the exercise of such power necessarily involved the discriminative removal of cattle from such district.

To illustrate: On the first day of February, 1891, there were diseased cattle in certain portions of the United States, but no locality or district had been designated as "infected," yet Section 6 was operative prohibiting the transportation of "*diseased* cattle" from *any part* of the United States to *any other* part; and the secretary of agriculture was as amenable to this prohibition as any other person.

Five days later the secretary designates a certain area of the country as that within which "a contagious and infectious disease known as splenic or southern fever exists among cattle"—not *all* cattle—and then proceeds to regulate the removal of cattle (not diseased cattle) from such locality under such rules as he "deemed necessary" as authorized by the act.

A reference to this rule will show that this infected district embraced nearly all of the state of Texas and nearly all of the United States south of the old "Mason and Dixon" line, east to the Atlantic Ocean. Shall we say that by this rule of February 5 all cattle in this half of the country were

made *diseased* cattle within the meaning of said Section 6, and that any regulation by the secretary for removing any of them, though not intended for slaughter, would be in violation of said section and so inoperative? To ask this question is but to answer it, and yet such was the decision of our Court of Appeals of which we complain.

Again; the Court of Appeals held this rule inoperative because it was not shown to have been accepted by the state of Colorado, and this because Section 3 made the expenditure of money appropriated by *that act* dependent upon such acceptance.

The proposition of our Court of Appeals can be formulated thus:

1st. The law confers upon the secretary the power and makes it his duty to make "such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation" of this disease among cattle.

2d. The law also appropriates \$150,000 to carry its provisions into effect, but does not authorize the expenditure of any part of such appropriation in the state of Colorado until this state shall signify its acceptance of the said rules and regulations.

3d. *Ergo*, these rules and regulations are inoperative in Colorado.

The fallacy of this construction of Section 3 of this act given by our Court of Appeals becomes undeniable when put thus in syllogistic form.

But again, this limitation as to expenditure was inoperative in 1891, when these rules were made, because this limitation was confined to the "money appropriated by *this act*" in the year 1884.

This act was passed in 1884, and nearly *seven*

years thereafter an "infected district" was designated by the rules made under it. In the meantime, Congress, at every session, renewed its appropriations to make this act effective, as follows: June 30, 1886, \$100,000; March 3, 1887, \$500,000; July 18, 1888, \$500,000; March 2, 1889, \$500,000; July 14, 1890, \$350,000; and the unexpended balance of the fiscal year 1890. These appropriations will be found in the following volumes of the U. S. Statutes at Large, viz.: 24, pages 103, 499; 25, pp. 333, 839; 26, p. 287.

After this last named appropriation of \$350,000, in July, 1890, and in the beginning of the next year, the Secretary of Agriculture made rules and regulations under this act, and Congress, in making this liberal appropriation of \$350,000, placed no restrictions upon its expenditure in states failing to accept the rules and regulations of the secretary.

So far we have addressed our remarks to the rules of February 5, 1891; but what we have urged will apply with equal force to the rules of April 23, 1891, but as to which, however, we say in addition:

*First*—These last rules do not purport to be made under any particular section of said act, nor do they purport to be a modification of the rules of February 5th.

*Second*—That portion of the rules which provides that cattle permitted into Colorado should not be allowed to come in contact with "cattle going to the Eastern markets," is authorized by said Act as a regulation of interstate commerce, and is not the exercise of a police power within the states.

As was said by this Court in the case of

*Leisy vs. Hardin*, 135 U. S. 100: "To extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the state to bring within the police power any article of consumption that a state might wish to exclude. \* \* \* The power to regulate commerce \* \* \* among the several states cannot be stopped at the external boundary of a state, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces. \* \* \* "

*Third.*—Should it be said that the rules of April 23 were inoperative because it was not shown "that the state authorities of the states of Colorado, Wyoming and Montana agreed to enforce" them as provided in the fourth paragraph of said rules, we reply that in such case the rules of February 5 would be operative, as to the violation of which by the defendant company there was no question, but which rule the Court of Appeals held also inoperative, as above shown, thereby depriving plaintiffs in error of the rights claimed thereunder.

We ask for such a construction of this statute as will effect the object for which it was passed.

In the case of *Lan O. W. Beer vs. United States*, 144 U. S., 47, this Court said:

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention and if possible, avoid an unjust or absurd conclusion."

The construction given by our Court of Appeals to this act by which its effectiveness was made largely dependent upon the assent of the local authorities was a pronounced subordination of con-

gress with reference to this vital branch of interstate commerce, to the supremacy of the several states and territories, in the absence of any provision in the statute recognizing or suggesting such subordination, so that this important legislation instead of being the "supreme law of the land," dropped to the level of what we generally designate as a "local option law."

In the case of *The Wheeling and Belmont Bridge Company vs. The Wheeling Bridge Company*, 138 U. S., 287, this Court used the following language pertinent to the present case :

"The alleged suspension of the power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers or special tribunals, or from any doubtful or uncertain expressions."

By the construction given by our Court of Appeals to this Act, the power therein conferred upon the Secretary of Agriculture to make proper rules by and through which its most important and beneficent purposes might be effected, was swept out of existence by construing an *implied* limitation as to the *expenditure of money*, as a limitation upon the *power* conferred to enforce the law itself, in direct opposition to the doctrine of this Court which we have last quoted.

By this clearly erroneous construction, these plaintiffs in error were told to pocket their loss of thousands of dollars and together with the multitude of owners of smaller herds in the same general locality whose losses were proportionately as large, were compelled to pay tribute to the rapacity and

criminal negligence of this defendant company.

We see no escape from a reversal by this Court of the judgment of which we complain.

Respectfully submitted.

W. C. KINGSLEY,  
*Attorney for Plaintiffs in Error.*